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Supreme Court of the United States

October Term, [redacted]
No. [redacted] 1966

ROBERT REDRUP,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department.

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IN THE

Supreme Court of the United States

October Term, 1964
No. .....

ROBERT REDRUP,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department.

Petitioner, Robert Redrup, prays that a writ of certiorari issue to review the judgment of the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department, entered in the above entitled case on December 17, 1964.

Opinions Below.

The action was tried in the Criminal Court of the City of New York, County of New York. No opinion was delivered by the three-judge court before whom the action was tried, except the statements at the conclusion of the trial finding petitioner guilty as charged [R. 33] and suspending sentence [R. 37].[1]

[1]The page references are to the Record on Appeal filed in the court below, and included in the transcript of the record prepared and certified by the clerk of the court below.

The judgment of conviction was affirmed by the Appellate Term of the Supreme Court for the First Judicial Department. No opinion was delivered by the said court.

Application for leave to appeal to the Court of Appeals of New York was denied without opinion.

Jurisdiction.

The judgment of the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department was entered on December 17, 1964. The said judgment is printed as Appendix A hereto. A timely application for leave to appeal to the Court of Appeals of New York was denied on January 4, 1965. By order of Mr. Justice Harlan dated March 25, 1965, the time to file this petition for a writ of certiorari was extended to and including April 19, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1257-(3).

Questions Presented.

1. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, an accused in a State obscenity prosecution, as the petitioner herein, can be convicted without any proof in the record that the books involved exceed the limits of candor in the Nation as a whole in the depiction or representation of matters pertaining to sex and nudity.

2. Whether, in the light of the requirements of due process of law under the Fourteenth Amendment and the constitutional standards for judging obscenity enun-

ciated by the Supreme Court, the State's failure to bear the burden of proving in the obscenity prosecution herein that the writings involved exceed the limits of candor in the Nation as a whole in the depiction or representation of matters pertaining to sex and nudity, invalidates the judgment of conviction rendered against petitioner.

3. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, a State may regard the trier of fact in a local obscenity prosecution as the embodiment of national community standards, competent to judge a challenged writing against those standards, without any evidence in the record, as in the case herein, to establish that the writing exceeds contemporary community standards, or appeals to prurient interest or is utterly without social importance.

4. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, a judgment of conviction can be rendered against an accused without proof in the record that the accused knew the contents of the material or believed that the material involved violated the law, and where books of a similar character have been held to be constitutionally protected by the courts of the State.

5. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, the books involved in the prosecution herein upon which a judgment of conviction was rendered are entitled to constitutional protection.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, and New York Penal Law, Section 1141, subdivision (1), are printed as Appendix B hereto.

Statement of the Case.

(a) By Information filed April 29, 1964 [R. 5] in the Criminal Court of the City of New York of the County of New York, petitioner was charged in two counts with violations of New York Penal Law, Section 1141, subdivision (1). The first count charged that petitioner, on April 10, 1964, did sell to one Greifenstein, a certain "obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting" book entitled *Lust Pool* [R. 5]. In similar language, the second count charged the sale of a book entitled *Shame Agent* to the same named person on the same aforesaid date [R. 5]. The cause came on for trial before a three-judge court in the Criminal Court of the City of New York for New York County on June 4, 1964 [R. 8].

(b) At the trial, the two books were offered into evidence by the prosecutor, without objection [R. 11-12]. No evidence was offered by the prosecution with respect to the alleged obscenity of the writings.

(c) The only evidence offered at the trial by the prosecution and petitioner was with respect to the issue of *scienter*. For the prosecution, a police officer, Greifenstein [R. 9], testified that he saw the two books displayed in a bookrack at a newsstand on 42nd Street in New York City, and asked "the clerk" [R. 10], petitioner herein, for the writings. Petitioner

removed the two books from the bookrack; placed them on the counter; the police officer paid the purchase price; the petitioner placed the two books in a bag and handed it to the officer [R. 10-11].

The officer asked petitioner whom he worked for [R. 12]. The petitioner replied that he had been in the employ of a Mr. Block for some two years. He earned seventy-five dollars ($75.00) a week [R. 13]. The officer asked petitioner: "Why do you sell this garbage?" [R. 13]. The petitioner replied: "There is worse stuff than that around", and stated, "I think these books here are worse", referring, stated Officer Greifenstein, to "girlie magazines that were on top of the counter with the nudes and seminudes in color and black-and-white" [R. 13].

The petitioner testified that his principal duty was working in the bookstore in the arcade of the subway where paperbacks covering a wide variety of literary, scientific and popular subjects were sold [R. 17]. Another man was ordinarily assigned to the newsstand but the man had been ill and petitioner had filled in for him for an hour until the arrival of another employee [R. 18]. Petitioner told the officer that he was up at the newsstand for only an hour because of the illness of the other employee for whom he was filling in [R. 19]. Petitioner had never seen the two books here involved before the officer asked for them [R. 20].

How Federal Questions Are Presented.

(d) At the trial, counsel for petitioner moved to dismiss each count of the Information, both at the end of the prosecution's case [R. 15-16] and at the end of the trial [R. 29], on the following grounds: "First,

that the People have failed to prove scienter, any knowledge of the contents of the book, either book, or that defendant had any reason to believe that the books came within the prohibition of the law. Second, on the ground that the People have failed to prove what constitute community standards, that the burden is on the People to offer such proof. Third, on the ground that neither book comes within the prohibition of the law, and therefore, the People have failed to make out a *prima facie* case, and that to permit a conviction under this information will constitute a violation of the Constitution of the State of New York, and of the due process clause of the Fourteenth Amendment to the United States Constitution" [R. 15].

At the conclusion of the trial, decision was reserved [R. 29-30]. On June 11, 1964, the court announced it had reached a decision: "The court has read the two books involved in the case and the motion to dismiss is denied as to each count of the information and the defendant is found guilty as charged of both counts of the information" [R. 33]. On July 28, 1964, petitioner received a suspended sentence [R. 36-37].

On appeal to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department [R. 3], the same federal questions as aforestated were briefed and argued before the court which affirmed the conviction, without opinion.

The same federal questions were also briefed and argued in support of the application for leave to appeal to the Court of Appeals of the State of New York. The said application was denied, without opinion, on January 4, 1965.

Reasons for Granting the Writ.

1. An essential part of a procedure, it is submitted, which purports to convict a person for the sale of alleged "obscene prints and articles" [R. 5] in violation of a state criminal statute (Penal Law 1141, subd. 1) is that all of the elements of the crime charged shall be proved beyond a reasonable doubt.

It is not only a fundamental principle of the common law that one accused in a criminal case is presumed to be innocent of the crime charged until he has been proved to be guilty beyond a reasonable doubt; due process of law in any case includes this presumption of innocence and imposes upon the prosecution the burden of proving the existence of every element necessary to constitute the crime charged.

A state criminal procedure, it has frequently been decided, may not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution Thus, "due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt", and "where the transcendent value of speech is involved", due process certainly requires "that the State bear the burden of persuasion to show that the [accused] engaged in criminal speech". *Speiser v. Randall,* 357 U.S. 513, 526. See also, *Tot v. United States,* 319 U.S. 463, 469, 473; *Thompson v. City of Louisville,* 362 U.S. 199, 206, and cases cited in n.13; *Garner v. Louisiana,* 368 U.S. 157, 173-174, 175-176; *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, 271, 277-280, 283-288; *Gar-*

rison v. Louisiana, 379 U.S. 64, 74-75; *Freedman v. Maryland*, 85 S. Ct. 734, 738-739.[2]

Unless the burden of proof in obscenity prosecutions is meticulously maintained, constitutionally protected writings may be suppressed, and individuals involved in their circulation punished, under unproved charges. The right to be heard before condemnation is hardly meaningful if the accuser is relieved of the burden of proving his accusation. Rights guaranteed by the First and Fourteenth Amendments cannot be protected where a criminal trial is drained of the basic elements of a fair trial, where "the whole proceeding is a mask". *Moore v. Dempsey*, 261 U.S. 86, 91. Plainly, if it is a sheer denial of due process to convict a person upon a charge not made, or a charge not tried, it is equally arbitrary to rest a conviction upon a charge not proved. *DeJonge v. Oregon*, 299 U.S. 353, 362; *Cole v. Arkansas*, 333 U.S. 196, 201; *Thompson v. City of Louisville*, 362 U.S. 199, 206.

In *Alberts v. California (Roth v. United States)*, 354 U.S. 476, this Court held that the safeguards necessary for securing the freedoms of speech and press for material not obscene required the following standard for judging the obscenity of a writing — whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The aforesaid

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[2] *Cf., Smith v. California*, 361 U.S. 147, 150-151; *Marcus v. Search Warrants of Property etc.*, 367 U.S. 717; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58; *Gideon v. Wainwright*, 372 U.S. 335, 342-345; *Mapp v. Ohio*, 367 U.S. 643, 656-657; *Malloy v. Hogan*, 378 U.S. 1, 6-8; *Morgan v. United States*, 298 U.S. 468, 477-481; 304 U.S. 1, 18-19; *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86.

standard, in substitution for the *Hicklin* test, was deemed adequate to withstand the charge of constitutional infirmity. 354 U.S. at 489.

The Court's opinion in *Roth-Alberts* further indicated that the newly formulated standard for judging obscenity was similar to the definition of obscenity formulated by the American Law Institute, to wit: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." 354 U.S. 487, n.20.

Roth-Alberts would appear, therefore, to have made plain that one essential element of the crime of obscenity, in both State and Federal jurisdictions, is the extent to which the writing in question substantially exceeds contemporary community standards, *i.e.*, the limits of candor in depiction or representation of sex, nudity or excretion. Indeed, in *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, it was noted that the proposed Official Draft of the American Law Institute defined obscenity as material which, if " 'considered as a whole, its predominant appeal is to prurient interest . . . and if *in addition* it goes substantially beyond customary limits of candor in describing or representing such matters' ". 370 U.S. at 486. Mr. Justice Harlan stated: "Obscenity under the federal statute thus *requires proof of two distinct elements:* (1) patent offensiveness; and (2) 'prurient interest' appeal" 370 U.S. at 486 (emphasis supplied).

Jacobellis v. Ohio, 378 U.S. 184, also involved a state court judgment of conviction after trial before a

three-judge court. In that case, witnesses testified for the prosecution and for the accused on the issue of obscenity, and the judgment of conviction of the state court was "based upon the testimony of numerous witnesses, the viewing of the film and all the evidence". *State v. Jacobellis*, 115 Ohio App. 226, 229, 175 N.E. 2d 123, 124 (1961). The highest state court upheld the judgment of conviction rendered by the "three judges sitting as the trier of the facts" (173 Ohio St.22, 28, 179 N.E. 2d 777, 781). This Court reversed, holding that the film involved was not obscene and hence entitled to the protection for free expression guaranteed by the First and Fourteenth Amendments. 378 U.S. at 186-187.

While members of the Court differed in *Jacobellis* as to whether the limits of candor with respect to the depiction or representation of sex were to be determined at any given time by the limits existent in the particular local community or in the Nation as a whole, no member of the Court appears to have doubted, it is submitted, that "contemporary community standards" is an element of the offense of obscenity, to be charged and proved. Mr. Justice Brennan stated: "It should also be recognized that the *Roth* standard requires in the first instance *a finding* that the material 'goes substantially beyond customary limits of candor in description or representation of such matters' ". 378 U.S. at 191 (emphasis supplied). Mr. Justice Brennan also added that the Court's conclusion as to the non-obscenity of the film in *Jacobellis* was based not only on a view of the material, but "in the light of the record made in the trial court" (378 U.S. at 196). Mr. Chief Justice Warren, dissenting, argued that the Court should limit

itself to a consideration only "of whether there is *sufficient evidence in the record* upon which a finding of obscenity could be made. *If there is no evidence in the record upon which such finding could be made, obviously the material involved cannot be held obscene.*" 378 U.S. at 202 (emphasis supplied).

In *Freedman v. Maryland*, 85 S. Ct. 734, the administration of a censorship system for motion pictures was alone involved, but the decision in the case has relevance here, it is submitted. The Court noted in *Freedman* that "unlike a prosecution for obscenity, a censorship proceeding puts the initial burden on the exhibitor or distributor". 85 S. Ct. at 738. It was pointed out that the Maryland procedural scheme required the exhibitor to "assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression." 85 S. Ct., at 739. This Court held that the state censorship system failed to satisfy constitutional requirements. "First, the burden of proving that the film is unprotected expression must rest on the censor." 85 S. Ct. at 739. Adverting to the decision in *Speiser v. Randall*, the Court, in *Freedman*, stated again that due process requires that the State bear the burden of persuasion to show that the appellants engaged "in criminal speech". 85 S. Ct. at 739.

A review of the decided cases, therefore, appears to make plain that the burden of proving in any obscenity prosecution the limits of candor in the Nation as a whole rests upon the prosecution as a requirement of due process. Without such evidence in the record, it is obvious that no finding can be made that the material "goes substantially beyond customary limits of candor

in description or representation of such matters". *Jacobellis v. Ohio,* 378 U.S. 184, 191.

In the case herein, there is absolutely no evidence in the record to support the conclusion that the two books involved substantially exceed the limits of candor in the Nation as a whole. Nor is there any mystery as to what occurred at the trial level: The prosecutor handed the books to the court; the court read the books; the court found the books "obscene". The State has suppressed two writings; and placed the stigma of criminality upon the seller of the writings, without proof that the books are outside the area of constitutional protection for freedom of expression.

If a return to *Hicklin,* with courts and juries acting as censors of material personally distasteful to them, is to be avoided, proof that material substantially exceeds the limits of candor in the Nation as a whole should be required in every obscenity prosecution, it is submitted. A state procedure which purports to dispense with such requirement in obscenity prosecutions ultimately results in the imposition of unconstitutional limitations on the public's access to constitutionally protected matter. *Speiser v. Randall,* 357 U.S. 513, 525; *Smith v. California,* 361 U.S. 147, 152-153; *Marcus v. Search Warrants of Property etc.,* 367 U.S. 717, 730-731; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66; *A Quantity of Copies of Books v. Kansas,* 378 U.S. 205, 211-212.

To place a book dealing with sex into evidence is hardly a step forward in support of an information charging the unlawful sale of an "obscene" writing. Sex is not obscenity, as this Court has repeatedly em-

phasized from *Roth-Alberts* to *Jacobellis*. See also, *Grove Press, Inc. v. Gerstein*, 378 U.S. 577; *Tralins v. Gerstein*, 378 U.S. 56. The sale of a book dealing with sex for like reasons imports no criminality.

The writings themselves plainly give no information as to what are the limits of candor in the Nation as a whole. Yet the trier of the fact in the state court, by its denial of the motion to dismiss the Information, and its finding of guilt, appears to have "presumed" that the writings substantially exceed the limits of candor in the Nation as a whole without any requirement of evidence to support such conclusion.

The power of the State to improvise presumptions in substitution for proof is limited by the due process provisions of the Constitution. *Tot v. United States*, 319 U.S. 463; *Manley v. Georgia*, 279 U.S. 1; *Bailey v. Alabama*, 219 U.S. 219; *Estern & Atl. R. Co. v. Henderson*, 279 U.S. 639. ". . . the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible." *Tot v. United States, supra*, at 469.

Especially do the due process provisions place limitations upon the State's power to presume guilt when First Amendment liberties are involved. The state criminal procedures by which books are suppressed and punishment imposed for their circulation are as important as the validity of the substantive law applied. "When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally

protected rights — rights which we value most highly and which are essential to the workings of a free society." *Speiser v. Randall*, 357 U.S. 513, 521. In *New York Times Co., et al. v. Sullivan*, 376 U.S. 254, it was emphasized that interpretations of the First Amendment guarantees have constantly refused to recognize an exception for any test of truth, "and especially one that puts the burden of proving truth on the speaker". 376 U.S. at 271. This Court held further that the rule requiring proof of actual malice is not satisfied by "presuming" malice from proof of general damages, for "the showing of malice required for the forfeiture of the privilege is not presumed but is a matter of proof by the plaintiff". 376 U.S. at 284. See also, *Garrison v. Louisiana*, 85 S. Ct. 209; *Henry v. Pearson; Henry v. Collins*, Oct. Term, 1964, Nos. 89, 90, decided March 29, 1965. 33 United States Law Week 3319.

To permit triers of fact in obscenity prosecutions to presume or infer from the mere reading of a writing dealing with sex that such writing substantially exceeds the limits of candor in the Nation as a whole in the depiction or representation of sex or nudity is to open the door wide to the suppression of material which is not obscene. Such a procedure encourages reliance upon the hit-or-miss subjective reactions of the trier of facts to material which the trier finds distasteful, and a writing which the trier of the facts finds particularly distasteful to himself will inevitably lead the trier to presume that the writing exceeds nationwide limits of candor. Yet, as case after case reveals, it is when the trier of facts is most certain that a writing exceeds contemporary community standards that the trier is

most often wrong. *Times Film Corp. v. City of Chicago*, 355 U.S. 35, reversing 244 F. 2d 432 (7 Cir. 1957); *One, Inc. v. Olesen*, 355 U.S. 371, reversing 241 F. 2d 772 (9 Cir. 1957); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, reversing 128 F. Supp. 564 (D.C. D.C. 1955), 249 F. 2d 114 (D.C. Cir. 1957); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, reversing 289 F. 2d 455 (D.C. Cir. 1961); *Jacobellis v. Ohio*, 378 U.S. 184, reversing 173 Ohio St. 22, 179 N.E. 2d 777; *Tralins v. Gerstein*, 378 U.S. 576, reversing 151 So. 2d 19 (Fla., 1963); *Grove Press, Inc. v. Gerstein*, 378 U.S. 777, reversing 156 So. 2d 537 (1963). See also, *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433, affirming 175 F. Supp. 488; *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 383 P. 2d 152, 31 Cal. Rptr. 800; *Haldeman v. United States*, 340 F. 2d 59 (10 Cir. 1965); *Larkin v. G.P. Putnam's Sons*, 14 N.Y. 2d 399, 252 N.Y.S. 2d 71, 200 N.E. 2d 760. Protection for non-obscene writings can only be assured if the burden is placed upon the prosecution to prove by sufficient evidence that the limits of candor have been exceeded in particular cases. *Cf., Weiman v. Updegraff*, 344 U.S. 183, 191.

Nor are the limits of candor in the Nation as a whole at a given time a matter of "judicial notice". There can be no assumption in reason that any particular trier of facts in a particular local community knows, without evidence, what is the customary freedom of expression in the Nation as a whole with respect to sex and sex relations in the various media of communication, such as books, magazines, the motion pictures, the theatre, television, and in such fields of exploration as literature, art, science, physiology, psychol-

ogy and other related areas. The limits of candor in the United States with respect to the depiction and representation of sex and nudity are not a matter of common and general knowledge, well established and authoritatively settled. So long as the belief existed that local standards were the criterion there may have been some argument for the position that the trial judge might take judicial notice of the standards of his own community. But now that this Court has held, in *Jacobellis, supra,* that it is national standards that must govern, it would be irrational to suppose that judges in the inferior criminal courts all over the country possess the background or knowledge sufficient for an informed judgment on the subject.

The power of "judicial notice" is, as to matters involving First Amendment protections, one to be used with great caution, and if there is the slightest doubt as to the facts or common knowledge of the facts, evidence should be required. "To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be 'to turn the doctrine into a pretext for dispensing with a trial'." *Garner v. Louisiana,* 368 U.S. 157, 173. The basis for appellate review and constitutional judgment is undermined "where the evidence is unknown". *Id.,* at 173.

There is no undue hardship placed upon the prosecution in requiring the State to prove the limits of candor and the extent to which the writing in question exceeds such limits. Prosecutors have successfully assumed the burden at the trial level in a number of obscenity prosecutions. *State v. Jacobellis,* 115 Ohio

App. 226, 175 N.E. 2d 123 (1961); aff'd. 173 Ohio St. 22, 179 N.E. 2d 777, rev'd. 378 U.S. 184; *People v. Smith (Smith v. California)*, App. Dept. Calif. Superior Court, No. CR A-5113, affirming judgment of conviction after jury trial and expert testimony offered on behalf of prosecution involving sale of *Tropic of Cancer*, cert. granted 373 U.S. 901, judgment vacated and case remanded to state court, 375 U.S. 259.

It may be that the limits of candor in the Nation with respect to the depiction and representation of sex and nudity cannot be delineated with the precision of a blueprint, but within reasonable bounds evidence of such limits at any given time can be adduced through expert testimony and other proof. *Cf., Smith v. California*, 361 U.S. 147, 163-167, 171-172; *Yudkin v. State*, 229 Md. 223, 182 A. 2d 798 (1962); A.L.I., *Model Penal Code* (Tent. Draft No. 6, 1957) 1-2, 44-45; Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 595-599 (1960).

If concepts of "judicial notice" or "presumptive guilt" are unacceptable in the area of obscenity prosecutions where First Amendment questions are integrally involved, it is equally objectionable, it is submitted, for a State to consider the trier of facts, judge or jury, as some legislative body equipped to decide for the Nation as a whole what the limits of candor are without the slightest proof in the record. The decision in *Jacobellis* rejecting any "local" definition of the community in delineating "the area of expression that is protected by the Federal Constitution" would appear to bar any attempt by a State to make a particular trier of fact in a specific obscenity prosecution the embodiment of

what constitutes the limits of candor in the Nation as a whole in the depiction and representation of sex and nudity. Such an attempt to substitute "ad hoc legislation" for proof in an obscenity prosecution is unjustified in reason and violates the basic requirements of fairness governing criminal trials in state and federal prosecutions. It has been stated: "But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86.

To turn a judge or jury in an obscenity prosecution into a "legislative" body allegedly equipped to decide what are the limits of candor in the Nation, and the extent to which the writing exceeds such limits, is to turn the triers of facts in obscenity prosecutions into local boards of censors, not only equipped to suppress writings but to attaint individuals responsible for their distribution. The end result of such state procedures is a return to *Hicklin*. This concededly, the Constitution prohibits. *Roth v. United States*, 354 U.S. 476; *Jacobellis v. Ohio*, 378 U.S. 184; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58; *Freedman v. Maryland*, 85 S. Ct. 734.

A state criminal procedure which permits suppression and punishment without proof of an essential ingredient of the offense, an ingredient made essential by the requirements of the Constitution as interpreted by this Court, undermines the due process and free press guarantees of the First and Fourteenth Amendments. Such a procedure neither affords justice to an accused nor the appearance of justice. The right to fair notice and hearing, as well as the right of confrontation and the assistance of counsel are essentially un-

dermined. See, *Pointer v. Texas*, Oct. Term 1964, No. 577, decided April 5, 1965. 33 United States Law Week 4306; *Douglas v. Alabama*, Oct. Term 1964, No. 313, decided April 5, 1965. 33 United States Law Week 4304. In the area of the circulation of the press and the public's access to constitutionally protected material, a state procedure which relieves the prosecution of the burden of proving that speech or press is criminal opens the door wide for wholesale suppression. Such a procedure makes only the fact of condemnation known to the public and reviewing courts; the actual reason and cause for condemnation remain forever secret.

The judgment of conviction as obtained here constitutes a broad departure from many specific constitutional guarantees, including the due process guarantees "representing fundamental ideas of fair play and justice in civilized society". *In re Oliver*, 333 U.S. 257, 282. The question involved is of substantial importance to the community in general, and should, it is submitted, be determined by this Court.

2. It is also submitted that the standard of proof required under the Constitution in obscenity prosecutions has not been satisfied in this case with respect to the issue of *scienter*.[3] This Court held in *Smith v. California*, 361 U.S. 147, that the strict liability feature of the California ordinance there involved would seriously restrict the circulation of books which are not obscene, "by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold". 361 U.S. at 152. The tendency of

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[3]A similiar question is presented in *Mishkin v. New York*, Oct. Term, 1964, No. 858, probable jurisdiction noted April 5, 1965. 33 U.S. Law Week 3330.

the California ordinance, this Court held, was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any scienter on his part regarding the book's obscenity". 361 U.S. at 160.

In view of the ruling in *Smith v. California,* and constitutional principles implicated therein, courts have required the prosecution to plead and prove that the accused knew that the material was obscene. In the recent decision of the Arizona Supreme Court (*State v. Locks,* 397 P. 2d 949 [December 23, 1964]), invalidating the state obscenity law as unconstitutionally vague, the court held that an accused "cannot be found guilty unless he had knowledge of the obscene or indecent nature of the material which it is contended he was keeping for sale and exhibiting". 397 P. 2d at 951. Noting that the words "obscene or indecent", without statutory definition, are words of "varied meaning, varying in definition from case to case" (397 P. 2d, at 951), the Arizona Supreme Court stated "it is obvious that a layman would have nothing but difficulty and confusion in his mind were he to attempt to work out his own definition of the words 'obscene or indecent' as used in A.R.S. 13-532" (397 P. 2d at 952). To similar effect, is *State v. Sul,* 146 Conn. 78, 147 A. 2d 686, 691 (1958); *Demetropolos v. Commonwealth,* 342 Mass. 658, 175 N.E. 2d 259, 262 (1961); *State v. Oman,* 261 Minn. 10, 110 N.W. 2d 514, 520 (1961); *Cohen v. State,* 125 So. 2d 560, 563 (Fla. 1961); *State v. Hudson County News Co.,* 35 N.J. 284, 173 A. 2d 20, 23 (1961). See also, Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 103-108 (1960).

If the aforesaid constitutional standard relative to *scienter* is to be maintained, plainly the proof in the record must be of "convincing clarity" to satisfy the demands of such standard. *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, 284-286. See also, *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 491-495. For in the free speech and free press areas, it is essential that those alleged to be engaged in "criminal speech" shall not be condemned without "clear, convincing and unequivocal" proof of specific unlawful knowledge and intent. Such proof must be "solid". There must be "that solidity of proof which leaves no troubling doubt in deciding a question of such gravity" as is implied in an attempt to make punishable a mental state in a context of constitutionally protected freedoms. *Baumgartner v. United States,* 322 U.S. 665, 670. See also, *Hartzel v. United States,* 322 U.S. 680, 686-687; *Gonzales v. Landon,* 350 U.S. 920.[4] "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, 285.

It is submitted that the proof adduced in the record herein was totally inadequate to satisfy the state's constitutional burden of proof on the issue of *scienter.* The record is uncontradicted that the petitioner had no knowledge of the contents of the writings, and it is equally clear on the record that petitioner had no reason

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[4]It has been stated that the criteria of "clear, unequivocal and convincing evidence which does not leave the issue in doubt" is "substantially identical with that required in criminal cases — proof beyond a reasonable doubt". *Klapprott v. United States,* 335 U.S. 601, 612.

to believe nor did he believe that the material was obscene or otherwise unlawful. The only witness produced by the State was the arresting officer who testified that when petitioner wanted to know why he had been arrested, the officer asked petitioner why he sold such "garbage", and petitioner replied that "there is worse stuff than this around", pointing to some girlie magazines on the counter [R. 13].

Neither the inquiry of the police officer nor the reply of petitioner were related to obscenity. The officer was plainly voicing a personal dislike for material which he believed from a view of the titles and covers were in poor taste and vulgar, to wit, "garbage". That the petitioner so construed the police officer's remark is evidenced by petitioner's comparison reference to "girlie" magazines, held constitutionally protected by the highest court of the State in a number of decisions. *People v. Richmond County News,* 9 N.Y. 2d 578, 216 N.Y.S. 2d 369, 175 N.E. 2d 681 (1961); *Larkin v. G. I. Distributors,* 14 N.Y. 2d 869, 252 N.Y.S. 2d 81.

There is nothing in the record to show that petitioner, a clerk, knew that the two writings he sold to the officer, at the latter's request, were obscene, nor does the record show that there was any reason for petitioner to believe that the material was violative of the State obscenity law. Books of a comparable character had previously been cleared. *People v. Birch,* 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (Sup. Ct. Cr. 1963) [books *Sex Kitten, Clipjoint Cutie, The Wild Ones, The Hottest Party in Town, Passion Pit, Bedroom at the Top, Butch, College for Sinners,* described as containing "a great number of descriptions of sexual activity which,

in many cases, are only tenuously associated with the plot and story line" (243 N.Y.S. 2d, at 528) — held not obscene and indictment dismissed]; *People v. Druss*, N.Y. Sup. Ct. Cr. #431-63, September 6, 1963 [obscenity indictment dismissed — books entitled *Strange Breed, Pagan, Swing Low Sweet Sinner, Sex Plan, A Rage Within, Horizontal Secretary, None But the Wicked*].

So far as the issues of petitioner's unlawful knowledge and intent are concerned relative to the alleged obscenity of these writings under the governing standards elucidated in the opinions of the courts, there is no probative evidence in the record to support the judgment of conviction. The State manifestly failed to meet the strict burden of proof imposed upon the State under the Constitution when First Amendment rights are involved. *New York Times Co., et al. v. Sullivan*, 376 U.S. 254; *Garrison v. Louisiana*, 85 S. Ct. 209; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478; *Schneiderman v. United States*, 320 U.S. 118; *Keegan v. United States*, 325 U.S. 478.

3. As a matter of constitutional judgment, the books herein involved are not, it is submitted, obscene. The writings clearly do not go beyond the customary limits of expression in language or theme found in many of the "bestsellers" in the literary world and other media of communication. Neither in language nor in theme do the books herein approach the candor of discussion, the explicitness of language that is found in writings of noted authors generally accepted and widely read by the public. Each of the books involved contains a plot and story line with characters and incidents relevant to such plot and theme.

This Court has repeatedly warned that the content of writings which may be suppressed is extremely limited, not to be measured by subjective reactions to disagreeable themes or candid expression. To summarize: The guarantees of the First and Fourteenth Amendments apply equally to material designed to entertain or amuse as to scientific or educational writings. *Winters v. New York,* 337 U.S. 507. A writing is not to be deemed obscene because "it does not conform to some norm prescribed by an official", or because not in "good taste", or because it is not "good literature", or because it does not have "educational value", or because it is not "refined", or because it has no "enduring values", or because it is allegedly "trash". *Hannegan v. Esquire,* 327 U.S. 146.

The Constitution protects expression, this Court has stated, without regard "to the truth, popularity, or social utility of the ideas and beliefs which are offered". *N.A.A.C.P. v. Button,* 371 U.S. 415, 445. Unless integrated with unlawful conduct, all ideas — "unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" — have the full protection of the guaranties of the First Amendment. *Alberts v. California,* 354 U.S. 476, 484. And in *Jacobellis v. Ohio,* this Court emphasized that material dealing with sex in a manner that advocates ideas or that has any other form of social importance cannot be branded as obscenity and denied the constitutional protection. Moreover, it was stated that the constitutional status of

the material does not turn on a "weighing" of its social importance against its alleged prurient appeal, for a writing cannot be proscribed unless it is utterly without social importance.

It is submitted that the books herein have value and social importance. They have entertainment and cathartic value, and they reflect a segment of life which, if crude, is nevertheless existent. It cannot be utterly without social importance for people to learn something about the truth of the society, or a segment of the society, in which they live. This Court has stated: "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison v. Louisiana,* 85 S. Ct. 209, 216.

Clearly, the books herein are comparable in their depiction of sex to those writings which have been found not to exceed the limits of candor in the Nation as a whole or to have some social importance justifying their protection under the First Amendment. See, *Tralins v. Gerstein,* 378 U.S. 576, reversing 151 So. 2d 19 (Fla. 1963) (*Pleasure Was My Business); Grove Press, Inc. v. Gerstein,* 378 U.S. 577, reversing 156 So. 2d 537 (1963); *(Tropic of Cancer); Jacobellis v. Ohio,* 378 U.S. 184, reversing 173 Ohio St. 22, 179 N.E. 2d 777 ("The Lovers"); *Grove Press, Inc. v. Christenberry,* 276 F. 2d 433, affirming 175 F. Supp. 488 *(Lady Chatterley's Lover); One, Inc. v. Olesen,* 355 U.S. 371, reversing 241 F. 2d 772 (9 Cir. 1957) ("One — The Homosexual Magazine"). See also, the separate opin-

ions of Mr. Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184; and *A Quantity of Copies of Books, et al. v. Kansas*, 378 U.S. 205.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Judgment of the Appellate Term.

At an Appellate Term of the Supreme Court, First Department, held at the County Court House, Borough of Manhattan, City of New York, on the 17th day of December, 1964.

Present: — Hon. Samuel M. Gold, J. P., Hon. Louis J. Capozzoli, Hon. Samuel H. Hofstadter, Justices.

The People of the State of New York, Respondent vs. Robert Redrup, Defendant-Appellant — Nov. #585.

Filed Dec. 17, 1964. Appellate Term.

An appeal having been taken to this Court by Robert Redrup, the defendant-appellant, from a judgment of conviction by Hons. Impellitteri, Castaldi, Rohan, Judges of the New York City Criminal Court, upon the charge of violation of §1141 of the Penal Law, entered on the 11th day of June, 1964, and said defendant-appellant having been sentenced by Hons. Levy, Spiegel, Whitman, Judges of said Court, on the 28th day of July, 1964, as follows:

Suspended sentence

and the said appeal having been heard and due deliberation having been had thereon,

It Is Ordered and Adjudged that the said judgment so appealed from be and the same is hereby affirmed.

Enter
SMG
Justice, Appellate Term
Supreme Court, First Department

APPENDIX B.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

3. The pertinent provisions of New York Penal Law, Section 1141, are:

> "§1141. Obscene Prints and Articles
>
> 1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute, . . . or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book . . . drawing, photograph motion picture film, figure, image, . . .
>
> "Is guilty of a misdemeanor . . ."
>
> (As amended L.1950, c.623, §§1-3; L.1950, c. 624; L.1954, c.703; L.1955, c.837; L.1956, cc.423, 661, 662, 681; L.1957, c.690; L.1958, cc.735, 736, eff. July 1, 1958, L.1958, c.737, §§1, 2, eff. July 1, 1958 . . .)